Supreme Court, U.S.
FILED

02 205 AUG - 6 2002

OFFICE OF THE CLERK

(1)

Nº. _____

In The
Supreme Court of the United States

HUGH M. DAVIS, JR.,
Petitioner,

v.

WILLIAM C. BOWRON,
BARBARA A. CHOMA,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*ROBERT D. HORVATH
Attorney at Law
3250 W. Big Beaver Road
Suite 342
Troy, MI 48084-2902
(248) 614-4770

Attorney for Petitioner
**Counsel of Record*

August, 2002

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
800- 581-2252

61 pgs

QUESTIONS PRESENTED

Whether, as a condition for imposing sanctions under the 28 USC § 1927 standard of unreasonably and vexatiously prolonging proceedings, in relation to an attorney's pleading decisions, there must be a finding of subjective bad faith, either as a matter of statutory construction or as a First Amendment requirement, in order to protect the attorney's primary role as an advocate?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Hugh M. Davis, Jr., is an individual. He was counsel for Plaintiff Conz in the underlying lawsuit. He is affiliated with Constitutional Litigation Associates, P.C., in which he is a principal.

Respondents

Respondents William Bowron and Barbara Choma were Defendants in the underlying lawsuit and were awarded monetary sanctions under 28 USC § 1927, which this Petition challenges. Petitioner is unaware of any corporate affiliations.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL & REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, IGNORES ITS OWN PRECEDENTS, AND, DISREGARDS FIRST AMENDMENT PROTECTION OF ADVOCACY UNDER NEW YORK TIMES V. SULLIVAN. 9

CONCLUSION 11

TABLE OF APPENDIX CONTENTS

6TH CIRCUIT COURT OF APPEALS FILINGS:

Opinion,
filed 2/7/02 ..... A1-A7

Order Denying Petition for
Rehearing En Banc
filed 5/8/02 ..... B1-B1

**UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF MICHIGAN FILINGS:**

Memorandum and Order,
filed 4/5/00 ..... C1-C2

Memorandum Opinion Approving
Report and Recommendation
filed 2/29/00 ..... D1-D4

Judgment and Order
Levying Sanctions,
filed 2/29/00 ..... E1-E1

Report and Recommendation,
filed 1/25/00 ..... F1-F26

TABLE OF CITED AUTHORITIES

Cases

Adickes v Kress & Co.,
398 US 144, 90 S Ct 1598,
26 LEd3d 142 (1970) 5

DeBauche v Trani,
191 F3d 499 (4th Cir. 1999) 10

In re Chmura,
461 Mich 517 (2000) 11

In re Keegan Management Company
Securities Litigation,
78 F3d 431 (9th Cir. 1996) 9

In Re Ruben,
825 F2d 977 (6th Cir. 1987) 10

Jones v Continental Corp.,
789 F2d 1225 (6th Cir. 1986) 9

Legal Services Corporation v Velazquez,
531 US 533, 121 S Ct 1043,
149 LEd2d 63 (2001) 11

New York Times Co. v Sullivan,
376 US 254, 84 S Ct 710,
721, 11 L Ed 2d 686 (1964) 11

Riddle v Egensperger,
266 F3d 542 (6th Cir. 2001) 9

Ridder v City of Springfield,
109 F3d 288 (6th Cir. 1997) 5

Wilson-Simmons v Lake County Sheriff's Dept.,
207 F3d 818 (6th Cir. 2000) 5

Statutes

28 USC § 1927 ..... *passim*

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at A-1) is unpublished. The District Court opinion (App. C, beginning at C-1) is, also, unpublished.

BASIS FOR JURISDICTION

The Sixth Circuit issued its opinion on February 7, 2002 and denied Petitioner's timely filed motion for rehearing on May 8, 2002. This petition is filed within ninety days of that latter date. 28 USC § 2101(c). This Court has jurisdiction by virtue of 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 USC § 1927, as impacted by the protection of advocacy afforded by the First Amendment.

28 USC § 1927 provides:

> Counsel's liability for excessive costs:
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and

vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

This petition seeks review of the use of 28 USC § 1927 to punish an attorney's pleading decisions in a civil rights case (42 USC § 1983), which occurred in the initial phase of the case, prior to discovery and before any substantive activity occurred. The underlying lawsuit involved very contentious circumstances arising from, false, parental kidnapping charges that were filed against Plaintiff Conz, which were spurred by his ex-spouse (Defendant Choma). Petitioner asserted concert-in-action claims against Defendant Choma (and her attorney, Defendant Bowron), for which he was sanctioned.

After Petitioner was removed from the case (see below), and other counsel appeared, the underlying lawsuit was dismissed. The District Court *sua sponte* assessed 28 USC § 1927 penalties in the amount of $10,000.00 against Petitioner and no other, after rejecting the Respondents' request for FRCP 11 sanctions because of the safe harbor provisions of that rule. Thus, Petitioner legitimately avoided FRCP 11 sanctions, but was snared by the spontaneous, *post facto*, application of judicial power under 28 USC § 1927.

Petitioner's three amended complaints were adjudged to have "unreasonably and vexatiously" multiplied the proceedings because they asserted claims that were, ultimately, found not to be viable. **(App. A)** [Sixth Circuit Slip opinion, pp 3 & 5.] It is necessary to assess that conclusion by considering the procedural facts pertaining to Petitioner's limited time as plaintiff's counsel in the lawsuit and by reviewing his own background.

Petitioner's reputation and skill in civil rights litigation are considerable. His first Sixth Circuit case was United States v United States District Court, 444 F2d 651 (6th Cir. 1971), (on briefs with the Center for Constitutional Rights, William Kunstler argued), aff'd, 407 US 297, 92 S.Ct. 2125, 32 LEd2d 752 (1972), which outlawed warrantless domestic political wiretapping. Petitioner has been presented and published as an authority in civil rights law. *See, e.g.*, 1998 DCL/MSU Law Review 599, Civil Rights: So you want to be a civil rights lawyer?

Petitioner was not the original attorney when the case was filed in June 1997. He entered the lawsuit in November 1997. His role as plaintiff's counsel lasted a little more than 12 months, ending in December 1998 (for the reasons described below). During that period, the case proceeded slowly through incipient administrative phases. Because of change of venue and recusal issues, the last trial judge did not assume control of the case until June 1998, almost 6 months after Petitioner took over the case and

almost 6 months after Petitioner took over the case and after the second amended pleading was filed in March 1998.

After Petitioner entered the case, he worked to narrow it. The initial complaint had run 53 pages, against 20 defendants, with 24 counts. Petitioner's first pleading eliminated 11 defendants and asserted 6 counts against the remainder in a 23-page complaint. Petitioner's first pleading was prior to any party's appearance in the case. Then, in March 1998, he received permission to file a second amended complaint, having filed a motion that was unopposed. Petitioner filed a third amended complaint in September 1998, having received permission from the court at the August 25, 1998 case management conference.

Thus, for the first 9 months that marked Petitioner's tenure in the case, nothing substantive happened. One defendant had filed a motion to dismiss (on February 24, 1998), but it is the policy of the district court to adjudicate civil cases "on the merits." That defendant withdrew his motion to dismiss, and, as noted, the district court granted permission to plaintiff (Petitioner) to file a third amended complaint.

However, within three months, Petitioner was removed from the case (on December 4, 1998) by the district judge, who made an adverse finding against him with respect to a dispute between counsel that arose from the preparation/execution of the scheduling order in August

1998, after which Petitioner was accused of unauthorized signatures.

Indeed, the district judge thought Petitioner had engaged in unethical conduct regarding the status conference order, and so found. Petitioner later faced an anonymous grievance over the matter, and was exonerated by the Michigan Attorney Discipline Board. It would have been a patently foolhardy act for Petitioner to consciously affix counsel's names, in a multiple-defendant proceeding, to a scheduling order knowing he was not authorized to do so. Petitioner has practiced law for over 30 years, being admitted in more than 20 federal district courts and in 6 federal courts of appeal, and numerous state courts.

The triggering principle under 28 USC § 1927 is the vexatious multiplication of litigation that produces excessive expense. This requires continued litigation in the face of known established facts of non-viability. Wilson-Simmons v Lake County Sheriff's Dept., 207 F3d 818, 824-825 (6th Cir. 2000) and Ridder v City of Springfield, 109 F3d 288, 298 (6th Cir. 1997).

Petitioner's long practice in civil rights litigation informed him that defendants Bowron and Choma, who are private citizens, could be sued under a concert-of-action theory, thus meeting the color of law element. Adickes v Kress & Co., 398 US 144, 90 S Ct 1598, 26 LEd3d 142 (1970). The lower court found his assertion of such a claim was unwarranted because Petitioner "never proved" the

connection, and working backward, concluded he was absolutely unjustified in asserting the claims. Yet, being unsuccessful does not equate with the vexatious multiplication of litigation.

Further, Petitioner was denied the chance to prove the connection. The court dismissed the lawsuit on December 4, 1998, ejecting him from the case at the same time. No party sought sanctions under 42 USC § 1988 at that time or ever. Petitioner was sanctioned only after the court allowed the case to be reinstated (with new counsel) on February 9, 1999. But then dismissed it again, with finality.

After the final dismissal of the underlying lawsuit, the court concluded that Petitioner had vexatiously prolonged its litigation. Although the same rationale applied to predecessor and successor counsel, no penalty was imposed on either of them. The sanction for improper conduct is necessarily defined in relation to Petitioner's relatively brief tenure. The cause of the lawsuit's continuation, after December 1998, was the lower court's reinstatement of the case in February 1999. Petitioner had nothing to do with that. Petitioner was sanctioned for unreasonably prolonging a lawsuit despite his limited time as counsel, his pleading-limited activity in the lawsuit during that time, and despite his own early exit from the case.

The facts known to Appellant when he drafted revisions in the pleadings, in the pre-discovery phase of the case, supported the possibility of claims under 42 USC § 1983 against Defendants Choma and Bowron, the only Defendants to seek sanctions. Based on the pre-discovery circumstances, it was reasonably apparent to Petitioner that false information (the known whereabouts of the child), which infused the parental kidnapping charge, ultimately dismissed, lodged by the prosecutor (Defendant Buday) against Plaintiff Conz, had emanated from Defendants Bowron and Choma. Defendant Choma was the underlying complainant. Defendant Bowron, her attorney, inter-faced with the civil authorities about the kidnap charge (and provided his own information to them). Defendant deputy sheriff Galloup was the officer in charge, and communicated not only with both Defendants Bowron and Choma but also with the prosecutor, Defendant Buday, as well.

According to information presented to Petitioner, Defendant Choma knew where the child was, so when she swore she did not, that was clearly false. According to information presented to Petitioner, when Defendant deputy Galloup stated he had not known of the whereabouts of the child in presenting the warrant for the prosecutor's approval, this statement was false, when measured against a number of factors, most notably Conz's Michigan attorney who denied telling Defendant Galloup

that he (the attorney) was unaware of Conz's and the child's location. There was documentary evidence from a Florida attorney that everyone knew that the child was legally in Florida when the kidnapping warrant was sought. These circumstances support a colorable claim of concert-of-action between Bowron/Choma and deputy Galloup, and the prosecutor, in and of themselves.

Further, there was an inculpatory "to whom it may concern" memo from the prosecutor (Defendant Buday), in which she needlessly disavowed that Defendant Choma had anything to do with the kidnap charges. That memo, in fact, highlighted their connection, especially since the lodging of the criminal charges was contemporaneous to Defendant Choma's filing for custody, through Defendant Bowron, in Grand Traverse County (the place of the kidnap charges), even though jurisdiction over the case and custody of the child was in another Michigan county. Most significantly, prosecutor Buday's memo was obviously false since Defendant Choma was the complainant on the kidnap charges initiated the day before the memo.

An attorney does not vexatiously multiply the proceedings by attempts to shape the claims in the case, through amendments of the pleadings in the very early, pre-discovery, phase of the case. Petitioner did not assert legally unsustainable claims, and he did not know (objectively or subjectively) of the absence of evidence with respect to the concert-in-action claims against

Defendants Bowron and Choma. Petitioner's presentation of state cognate claims had no impact and did not prolong the litigation, although the district court briefly mentioned their non-viability in its ruling on the sanctions.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, IGNORES ITS OWN PRECEDENTS , AND , DISREGARDS FIRST AMENDMENT PROTECTION OF ADVOCACY UNDER NEW YORK TIMES v. SULLIVAN.

In the opinion below, the Sixth Circuit applied 28 USC § 1927 in a way that allows attorney-punishment despite the absence of any conscious, or willful, impropriety. Jones v Continental Corp., 789 F2d 1225, 1230 (6th Cir. 1986). In contrast, the Ninth Circuit requires subjective bad faith. In re Keegan Management Company Securities Litigation, 78 F3d 431, 435 (9th Cir. 1996).

Conversely, the Sixth Circuit recently held that 28 USC § 1927 requires intentional misconduct in Riddle v Egensperger, 266 F3d 542, 553 (6th Cir. 2001). Significantly, at other times, the Sixth Circuit has used a standard that requires the adverse party to oppose a

litigation-step, to prevent aggregate acts of misconduct, before seeking sanctions under 28 USC § 1927. In Re Ruben, 825 F2d 977, 988, 990 (6th Cir. 1987). That latter principle also suggests a subjective component, while also indicating a practical safe harbor procedure, analogous to FRCP 11, which counsels that sanctions, even against parties, must have some procedural forewarning. Thus, Sixth Circuit decisions have produced a muddled picture, which do not offer attorneys clear substantive, or procedural, guidelines to allow them to avoid the application of the statute to their pleading decision-making.

In addition, the Fourth and the Ninth Circuit Courts of Appeal refuse to apply the statute to initial pleading decisions. DeBauche v Trani, 191 F3d 499, 512-511 (4th Cir. 1999) and In re Keegan Management Company Securities Litigation, *supra*. These Circuits expressly narrow the scope of the statute, unlike the Sixth Circuit.

Furthermore, when the attorney conduct being scrutinized involves advocacy decisions, *i.e.*, what claims to bring and against whom, the use of the statute necessarily triggers First Amendment concerns. The practice of law is a profession of advocacy, one that consists of the daily expression of ideas for the redress of common law claims, statutory rights, equitable interests and/or constitutional rights, and for the development of new legal theories. Attorneys shape their messages for clients. Attorney-advocacy of claims, therefore, is

protected by the First Amendment. Legal Services Corporation v Velazquez, 531 US 533, 121 S Ct 1043, 1049, 149 LEd2d 63 (2001).

Speech on such matters, in order to be properly safeguarded, should be protected by a constitutional rule akin to speech on other public matters. New York Times Co. v Sullivan, 376 US 254, 270-271, 84 S Ct 710, 721, 11 L Ed 2d 686 (1964). Public opinions are protected by an actual malice standard, which is measured subjectively. *Cf.* In re Chmura, 461 Mich 517 (2000)(Speech of judicial candidate is protected by New York Times standard, measured objectively). Given the importance of attorney advocacy for the interests of clients and for the development of the law, generally, an attorney's pleading decisions should be protected by the New York Times Co. v Sullivan standard.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Zealous advocacy must be protected in litigation generally, and in civil rights cases in particular. As a matter of the interpretation of 28 USC § 1927, the balance of interests weighed should be applied in favor of counsel regarding primary advocacy decisions (pleadings), *i.e.*, whether and what claims to assert based on the apparent facts and their possible development. Furthermore, for this crucial advocacy-decision, there must

be a requirement of subjective bad faith in order to protect fundamental First Amendment rights, which will assure the robust and uninhibited debate over the development of constitutional law.

Robert D. Horvath (P27633)
Counsel for Petitioner
3250 W. Big Beaver Rd., Ste. 342
Troy, MI 48084-2902
(248) 614-4770

Dated: August____, 2002

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 00-1528

FILED
Feb 7, 2002
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUGH M. DAVIS, **Appellant,**	)	
v.	)	**On Appeal from the U.S. District Court for the Western District of Michigan**
WILLIAM C. BOWRON and BARBARA A. CHOMA, **Appellees.**	)	

Before: **BATCHELDER** and **COLE**, Circuit Judges; and **BECKWITH**, District Judge.

SANDRA S. BECKWITH, District Judge. On January 25, 2000, the United States Magistrate Judge assigned to the case of *Edward F. Conz, Jr. v. Kenneth Lady, et al.*, No. 1:98cv52, in the Western District of Michigan issued a report and recommendation pursuant to which he recommended that the plaintiff Conz' attorney, the appellant herein, be sanctioned under 28 U.S.C. § 1927. Mr. Davis

Court overruled the objections and approved the report and recommendation. Davis filed this appeal. For the reasons that follow, we **AFFIRM**.

Mr. Conz, employing the services of another attorney, initiated the underlying action against Appellee Choma, his former wife, and Appellee Bowron, an attorney who had represented her, among numerous others. He asserted some 24 claims under state and federal law.

When Appellant Davis was substituted as Conz' counsel, he amended the complaint to eliminate many of the defendants and claims. He persisted, in that first revision of the complaint and subsequent revisions, to assert claims under state law that, the District Court concluded, were barred by the applicable statutes of limitations. He also persisted in asserting claims uner 42 U.S.C. § 1983 against Appellees Choma and Bowron, even though, the District Court found, he never attempted to demonstrate that either of the Appellees acted under color of state law in any respect that was material to Mr. Conz' claims. For those reasons, the District Court eventually entered judgment in favor of Appellees Choma and Bowron.[1]

Both Ms. Choma and Mr. Bowron subsequently moved for sanctions under Rule of 11 of the Federal Rules of

---

1 That judgment was entered after attorney Davis had been replaced, at the District Court's insistence, as counsel for Mr. Conz.

Civil Procedure against Mr. Davis. The Magistrate Judge recommended that their motions be denied for failure of the movants to comply with Rule 11's procedural requirements. He recommended, *sua sponte*, that sanctions be imposed pursuant to 28 U.S.C. § 1927, which provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

The Magistrate Judge concluded that Mr. Davis was subject to sanctions under § 1927 on two separate grounds. First, he observed that Mr. Davis had shown disrespect for the court, failed to comply with its orders, and violated the rules of professional conduct. On that basis he recommended that Davis be ordered to pay Appellee Choma the $1,426 she had incurred in attorney's fees and costs relating to a hearing before the District Court to determine whether Mr. Davis had committed acts of misconduct. Mr. Davis failed to timely appear at that hearing, and the matter was adjourned.

The second class of conduct identified by the Magistrate Judge was Mr. Davis' filing and maintenance of vague and unsupportable claims. The Magistrate Judge observed that Mr. Davis had failed to identify which claims

in the amended complaints he prepared and filed were asserted against which of the defendants in the underlying action. Rather, he recited facts at great length and then set our his claims tersely without identifying the defendants to which each pertained. He also persisted in asserting state law claims that were clearly time-barred and, therefore, unsupportable. Finally, he asserted claims against both Appellees under 42 U.S.C. § 1983 without ever identifying a basis for his assertion, essential to the claims, that they had acted under color of state law. The Magistrate Judge recommended that Mr. Davis be required to pay each of the appellees $5,000.

Appellant Davis filed numerous objections to the Report and Recommendation. The District Court considered the objections, overruled them, and imposed the sanctions recommended by the Magistrate Judge.

On appeal, Mr. Davis argues that the District Court abused its discretion by imposing sanctions without affording him notice and an opportunity to be heard. He argues that his conduct was a result of negligence or inadvertence and, accordingly, not sanctionable under 28 U.S.C.§ 1927. Finally, he argues that the District Court erred by failing to specify the conduct that gave rise to the sanctions and the costs and fees that were attributable to that conduct. We review the District Court's order imposing sanctions for abuse of discretion. See *Ridder v. Springfield*, 109 F.3d 288, 298 (6th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

Mr. Davis' first and third arguments on appeal find no

support in the record or in the District Court's order. Mr. Davis had not been warned, prior to the issuance of the Magistrate Judge's report and recommendation, specifically that the court might impose, *sua sponte*, sanctions under § 1927. He was well aware, however, that his conduct in the prosecution of his client's claims was the subject of inquiry by the District Court. Indeed, the District Court had convened a hearing, at which Mr. Davis failed to timely appear, for the purpose of determining whether Mr. Davis had engaged in acts of misconduct.

In any event, after the Magistrate Judge recommended that the District Court impose sanctions under 28 U.S.C. § 1927, Mr. Davis could no longer argue that he was without notice of the District Court's intention to consider doing so. Moreover, the fact that he filed objections to the report and recommendation belies his contention that he was not afforded an opportunity to be heard, which is simply the opportunity to make arguments and present evidence, not the right, literally, to speak to the court. See *Wilson-Simmons v. Lake County Sheriff's Department*, 207 F.3d 818, 822 (6th Cir. 2000). Mr. Davis was afforded both notice and opportunity to be heard.

Mr. Davis' third argument on appeal, that the District Court failed to identify the sanctionable conduct and the reasonable costs arising therefrom, is equally unavailing. A review of the District Court's order reveals both and identification of the conduct upon which the sanctions were

based and an assessment that the sanctions represented the excess costs, expenses, and attorney's fees reasonably incurred because of that conduct. *See* 28 U.S.C. § 1927.

Appellant Davis' second argument, that his conduct was a result of negligence or inadvertence and, accordingly, not sanctionable under § 1927, is based upon a misreading of the District Court's opinion. The District Court approved of the Magistrate Judge's report and recommendation the Mr. Davis compensate Appellee Choma for her costs and fees arising from the show cause hearing, at which Appellant Davis failed to timely appear. The court observed, however, that Mr. Davis had engaged in dilatory practice throughout the litigation of the underlying action. It did not base the sanction upon an isolated incident of conduct that might properly be described as inadvertent but upon a pattern of limaceous practice culminating in Mr. Davis' failure to appear at the time of the show cause hearing. The record in the underlying action amply supports the District Court's finding in that regard.

We further note that the sanctions were based primarily upon Appellant Davis' persistence in asserting vague, ill-defined claims, claims that were clearly barred by the applicable statutes of limitations, and claims for which he could never identify evidentiary support. Those actions were not attributed to negligence or inadvertence, and the District Court concluded that Mr. Davis should have been aware from the time of his appearance on behalf of Mr. Conz that none of

his claims against Appellees Bowron and Choma were supportable. That conclusion was not an abuse of discretion.

The District Court further concluded that Appellant Davis' conduct unreasonably and vexatiously multiplied the proceedings in the underlying action. We find no abuse of discretion in that conclusion, which warrants the imposition of sanctions under 28 U.S.C. § 1927. *See Riddler*, 109 F.3d at 298-299. Accordingly, we **AFFIRM** the District Court's order imposing sanctions upon Appellant Davis.

00-1528

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUGH M. DAVIS, JR., *Appellant,*	)	
v.	)	**ORDER**
WILLIAM C. BOWRON AND BARBARA CHOMA, *Appellees.*	)	FILED May 8, 2002 Leonard Green Clerk

BEFORE: BATCHELDER and COLE, Circuit Judges; and BECKWITH*, District Judge

The court having received a petition for rehearing en banc, and the petition have been circulated not only to the original panel members but also to all other active judges rehearing en banc, the petition has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green,
Leonard Green, Clerk

---

* Hon. Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
Apr 5, 2000
Western District
of Michigan
by Deputy Clerk

EDWARD F. CONZ, Jr.,
Plaintiff,

v. **Case No. 1:98-CV-52**
HON. DAVID W. McKEAGUE

KENNETH LADY, THOMAS HUNDT, CLERK BROWN, STEVEN GALLOUP, BETTY J. JOHN, BARBARA A. CHOMA, LYNN BUDAY, and WILLIAM C. BOWRON,
Defendants.

MEMORANDUM OPINION AND ORDER

Now before the Court is a motion to alter or amend judgment filed by attorney Hugh M. Davis, Jr., on March 10, 2000.[1] In his motion, Davis moves the Court to vacate those portions of an Order issued February 29, 2000, approving the report and recommendation of the magistrate judge and sanctioning Davis $10,000 pursuant to 28 U.S.C. § 1927. For the reasons set forth below, attorney Davis' motion will be denied.

---

[1] The Court treats Davis' motion styled as a "motion for reconsideration" as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e).

Davis advances three arguments that merely repeat objections made to the magistrate judge's report and recommendation. These objections were reoundly rejected by the Court in the February 29, 2000, Memorandum Opinion approving the magistrate judge's report and recommendation. Davis first asks the Court to withdraw its "previous determination that he [Davis] acted unethically." Second, Davis requests the Court wait until plaintiff Conz, Jr.'s argument is well-answered both by the Court's Opinion dated December 4, 1998, and the report and recommendation of the magistrate judge issued January 25, 2000, and approved by the Court on February 29, 2000. The Court stands by these earlier decisions.

Accordingly, Davis' motion to alter or amend is hereby DENIED.

IT IS SO ORDERED.

Dated: April 4, 2000

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
Feb 29, 2000
Western District
of Michigan
by Deputy Clerk

EDWARD F. CONZ, Jr.,)
Plaintiff,)
)
v.)
)
)
KENNETH LADY, et al.,)
Defendants.)

Case No. 1:98-CV-52
David W. McKeague

MEMORANDUM OPINION APPROVING REPORT AND RECOMMENDATIONS

This case presents two motions for sanctions by defendants Barbara Choma and William C. Bowron, against plaintiff's attorney, Hugh M. Davis, Jr., pursuant to Fed R. Civ. P. 11. Pursuant to 28 U.S.C. § 636(b)(1), the matter has been reviewed by the United States Magistrate Judge Joseph G. Scoville, who has issued a report and recommendation. The magistrate judge has recommended that the motions be denied due to procedural infirmities, but has concluded that sanctions under 28 U.S.C. § 1927 are appropriate. According to the governing statute, the standard of review is whether the conclusions established in the report and recommendation are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Petitioner has timely filed objections, which the Court now considers de novo.

I

Although Mr. Davis raises a litany of objections; most are immaterial in relation to Judge Scoville's report and recommendation. This Court will only address those objections based on legal proportions. Mr. Davis's first discernable legal objection concerns the propriety of imposing sanctions based on a cases that has issues currently under appellate review. Even cursory research into established case law would show that such a decision is within the discretion of the district court, and that there is no perceived prejudice from such an approach. *Ridder v. City of Springfield*, 109 F.3d 288, 292 (6th Cir. 1997); See also *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 (1982).

Mr. Davis also raised an objection to the alleged lack of notice that sanctions could or would be imposed. The source of his objection surrounds the fact that while Rule 11 sanctions were deemed inappropriate by the magistrate judge, section 1927 sanctions were recommended *sua sponte*. This objection is disingenuous. On October 19, 1998, Mr. Davis was found to have "shown disrespect for the court by failing to comply with its orders," failed to file reports on time, and violated the Rules of Professional Responsibility. (Op. at 2). Accordingly, "[a]n attorney is liable for § 1927 soley for excessive costs resulting from the violative conduct." Rider, 109 F.3d at 299. Therefore, the finding of this Court alone should have put Mr. Davis on notice that sanctions were

possible. Even if this was not sufficient, Judge Scoville's report and recommendations gave Mr. Davis the appropriate ten-day period provided by law, according Fed. R. Civ. P. 72(b), in which to object. (R&R at 13).

Finally, Mr. Davis heaps accusations on top of allegations with regard to the objectivity of this Court, and of Judge Scoville. Mr. Davis tenders scurrilous charges regarding the undersigned purposely leaving the bench upon his late arrival into the courtroom, and throws down the gauntlet of disclosure with regard to the grievance filed against him in this matter. With regard to a disclosure by the undersigned, and highlighting the complete lack of duty to do so, no grievance of any kind emanated from this chambers. And from a factual standpoint, Mr. Davis is patently incorrect when asserting that he was in the courtroom prior to the undersigned leaving the bench. There is no time for such tedious games, and it is unfortunate the Mr. Davis is grasping at such wisps of smoke to defend his actions.

With regard to Judge Scoville, Mr. Davis tenders the notion that a magistrate judge's adoption of a finding from a federal district judge is an indication of bias rising to a level warranting disqualification. Such a premise is absurd. This Court found ethical violations in the conduct of Mr. Davis in a memorandum opinion dated December 4, 1998. For Judge Scoville to adopt this finding in his report and recommendation is both rational and reasonable. Furthermore, with regard to Mr. Davis' charge of bias, the

established law in the Sixth Circuit requires that sources of bias be "extra-judicial," one of the few objections Mr. Davis failed to raise. See Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999); Green v. Nevers, 111 F.3d 1295 (6th Cir. 1997). Consequently, the charge of bias levied by Mr. Davis is unfounded and unworthy of further discussion.

II

Having waded through the objections lodged by Mr. Davis, and having undertaken a de novo review of the record, the Court finds the magistrate judge's analysis to be thorough and proper in all respects. Mr. Davis' objections do not undermine the integrity of the magistrate judge's reasoning in any way. The Court therefore, adopts the report and recommendation over Mr. Davis' objections. Accordingly, the report and recommendation is approved, and the sanctions are levied. A judgment order consistent with this opinion shall be issued forthwith.

Dated: February 29, 2000

/s/ David W. McKeague

Hon. David W. McKeague
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD F. CONZ, JR. Plaintiff,	)	
	)	Case No. 1:98 cv 52
v.	)	
	)	Hon. David W. McKeague
KENNETH LADY, et al., Defendants.	)	

JUDGMENT ORDER LEVYING SANCTIONS

In accordance with the Court's memorandum opinion of even date, **IT IS HEREBY ORDERED** that Defendant's motion for Rule 11 sanctions is denied. **IT IS FURTHER ORDERED** that sanctions in the amount of $5,000.00 each be awarded to defendant Choma and defendant Bowron against attorney Hugh M. Davis, Jr. pursuant to 28 U.S.C. § 1927.

Dated: February 29, 2000

/s/ David W. McKeague
Hon. David W. McKeague
United States District Judge

FILED
Jan 25, 2000
Western District
of Michigan
by Deputy Clerk

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD F. CONZ, JR. PLAINTIFF,	)	CASE NO. 1:98CV52
V.	)	HONORABLE DAVID W. MCKEAGUE
KENNETH LADY, ET AL.,	)	

REPORT AND RECOMMENDATION

This was a civil rights action brought under various federal and state theories by Edward F. Conz against his former wife Barbara A. Choma and other defendants. The matter is presently before the court on the motions of defendant Barbara Choma and William C. Bowron for Rule 11 sanctions (docket #'s 108, 113). The motions were referred to me for report and recommendation by Judge McKeague's Order of Reference entered November 8, 1999, pursuant to 28 U.S.C. § 636(b)(1)(B). (Order, docket # 120). For the reasons set forth below, I conclude that neither defendant has satisfied the procedural requirements for an award of Rule 11 sanctions. I further conclude that plaintiffs former attorney, Hugh M. Davis, Yr., is liable for the imposition of costs and attorney's fees under 28 U.S.C. § 1927.

FILED
Feb 29, 2000
Western District
of Michigan
by Deputy Clerk

Proposed Findings of Fact

1. This civil action was initiated by the filing of a 53-page complaint in the United States District Court for the Eastern District of Michigan. The original complaint contained 24 counts and named 20 defendants, including two of plaintiffs ex-wives, the Michigan State Police, public and private attorneys, and numerous municipal employees Defendant Choma is one of plaintiffs ex-wives, and defendant Bowron was her civil attorney in divorce proceedings. The complaint was filed by attorney Gary L. Sackett on June 23, 1997. Within thirty days, Mr. Sackett filed a motion to withdraw as counsel (docket # 3), citing "irreconcilable differences" with the plaintiff. Judge Barbara Hackett granted the motion as unopposed. (Order, docket # 5).

2. On November 18, 1997, attorney Hugh M. Davis, Jr., of the law firm "Constitutional Litigation Associates, P.C." of Detroit, Michigan, filed his appearance on behalf of plaintiff. Mr. Davis thereafter filed a first amended complaint terminating eleven of the named defendants and asserting six counts against the remaining defendants. The case was transferred to this court and the file received on January 20, 1998.

3. Among the facts underlying the first amended complaint were state prosecutions against plaintiff in 1994 on six charges, including felony parental kidnaping, felony check charges and misdemeanor charges for stalking, assault

and battery, and performing an occupation without a license. These charges were eventually resolved in the state courts by a plea agreement, pursuant to which plaintiffs wholly owned Corporation entered a plea of guilty to the two licensing charges and plaintiff pled guilty to the felony charge of writing checks on insufficient funds, in exchange for dismissal of the remaining charges. In the present civil case, plaintiff brought six counts under 42 U.S.C. 1983, and pendent state-law theories, naming all defendants indiscriminately in each count. The complaint apparently sought to hold all defendants -- including two of plaintiffs former wives, police officers, prosecutors and private attorneys -- responsible for all counts, under a conspiracy theory.

4. On February 23, 1998, plaintiff filed a motion for leave to file a second amended complaint (docket # 18). On the next day, defendant Bowron filed a motion for dismissal or for summary judgment (docket ~# 21), directed to the first amended complaint. The motion to amend was granted by order entered March 12, 1998 (docket # 26). On March 30, 1998, defendant Choma filed her answer and counterclaim (docket #31).

5. By administrative order entered June 11, 1998, Chief Judge Richard Enslen reassigned this matter to District Judge David W. McKeague (docket # 51). Judge McKeague thereafter issued a notice of hearing for the dispositive motion filed by defendant Bowron and set the matter for a Rule 16 scheduling conference (Orders, docket

#'s 53, 54). Judge McKeague conducted the scheduling conference on August 25, 1998. At the conference, he granted plaintiff leave to file a third amended complaint and recognized that defendant Bowron's dispositive motion, directed to a twice-superseded pleading, was moot. That motion was therefore withdrawn. (*See* Case Management Order, docket # 61).

6. In addition, Judge McKeague issued an order requiring an evidentiary hearing before me to determine whether Mr. Davis, plaintiff's counsel, had affixed signatures of one or more defense attorneys to the joint status report without authority (docket # 62). On September 25, 1998, I conducted an evidentiary hearing pursuant to the order of reference, receiving testimony from Mr. Davis, Gary A. Colbert (attorney for defendant Choma), Mark H. Verwys and Steven Stapleton (attorneys for defendant John). (*See* Transcript, docket # 117). On October 1, 1998, I issued a report and recommendation (docket # 67) finding that Mr. Davis had signed a partial joint status report on behalf of Mr. Colbert without permission and that he signed the final status report on behalf of Mr. Colbert and Mr. Verwys without fulfilling the conditions precedent that they had established.

7. On October 9, 1998, plaintiff filed a third amended complaint (docket # 68). All defendants thereafter moved to dismiss or for summary judgment in response to the third amended complaint. After receiving an extension of time to do so, Mr. Davis filed a five-page response

covering all dispositive motions (docket # 86). The response failed to cite a single case in support of the validity of his client's claims.

8. On October 19, 1998, Mr. Davis filed untimely objections to the report and recommendation (docket # 70). In response to the report and recommendation and objections, Judge McKeague issued an order to show cause why plaintiffs counsel should not, be disciplined (docket # 83). On December 4, 1998, Judge McKeague conducted a hearing on the order to show cause, at which Mr. Davis failed to appear. On the same day, Judge McKeague issued a memorandum opinion and order (docket # 88) adopting the report and recommendation and making further findings. Judge McKeague found that Mr. Davis consistently had "shown disrespect for the court by failing to comply with its orders," failed to file reports and pleadings on time, and violated the Rules of Professional Responsibility. (Op. at 2). The court removed Mr. Davis as plaintiffs counsel on account of his misconduct, and dismissed the action without prejudice.

9. On February 1, 1999, attorney Leland T. Schmidt filed an appearance on behalf of plaintiff and moved the court for an order reinstating the case and for other relief. (Motion, docket # 91). By order entered February 9, 1999, Judge McKeague reinstated the case, and by subsequent order, he granted plaintiff some relief with regard to deadlines. (Orders, docket #'s 94, 99). Judge McKeague also granted new counsel an opportunity to

respond to the pending motions for dismissal or summary judgment. Judge McKeague scheduled the motions for hearing for May 20, 1999 (docket# 105).

10. When reviewing the dispositive motions and underlying pleadings, Judge McKeague found that the third amended complaint was still insufficient to inform the court and the parties of the basis for alleged liability for each of the defendants. Judge McKeague therefore directed plaintiff's new counsel to file and serve a summary document, setting forth the alleged acts of each defendant giving rise to liability and delineating the claims asserted against each. Mr. Schmidt complied with that direction by filing and serving a chronology of case events (docket # 106).

11. The parties appeared before Judge McKeague for a hearing on all dispositive motions on May 20. 1999. At the outset of the hearing. counsel tendered to the court a stipulation dismissing all claims against defendants Hunt, Brown, John and Buday. Judge McKeague reviewed the stipulation and signed the order of dismissal. Judge McKeague then engaged in a rather extensive questioning of counsel to associate the various claims in the third amended complaint with the various defendants named, as the third amended complaint tended to assert all claims against all defendants indiscriminately. As a result of the court's inquiries, it was determined that defendants Choma and Bowron were involved only in count 2, which asserted Fourth Amendment claims and pendent state-law claims arising from the maintenance and prosecution of parental

kidnaping charges against plaintiff. Additionally, the court determined that counts 1, 3, 4 and 7 should be dismissed, because they were not asserted against any remaining defendant.

12. The court then heard argument from counsel for defendant Bowron and counsel for defendant Choma concerning the claims asserted against those defendants in count 2. Counsel noted that Mr. Schmidt's response to the summary judgment motions conceded that all pendent state claims for false arrest, false imprisonment or malicious prosecution were barred by the statute of limitations. Consequently, the only remaining claim against those two defendants was a section 1983 claim arising under the Fourth Amendment. The court questioned plaintiffs counsel extensively concerning the question whether these defendants, both private citizens, acted under color of state law with regard to their involvement in the criminal prosecution against plaintiff. The court ultimately ruled from the bench that plaintiff had adduced no evidence that could support a jury finding that either defendant was acting under color of state law. The court therefore announced its decision to grant the dispositive motions as to defendants Bowron and Choma. The claims against the other defendants were argued at the same hearing, but the court took those issues under advisement. On November 2, 1999, the court issued a memorandum opinion (docket # 118) finding that the remaining motions for summary judgment should also be granted. The court entered judgment on the same

day (docket # 119), granting all dispositive motions, including the motions by Choma and Bowron that had been the subject of the court's oral opinion on May 20.

13. On July 8, 1999, defendant Choma filed her motion for sanctions (docket # 108). The motion was filed after Judge McKeague's oral ruling granting defendant Choma's motion, but before the order of November 2 embodying that ruling. It is undisputed that defendant Choma did not serve the motion 21 days before filing it, as required by the "safe harbor" provisions of Rule 11. FED. R. Civ. P. 11(c)(1)(A). Choma's counsel had sent plaintiffs former attorney, Mr. Davis, a so-called "Rule 11 letter" in August of 1998, which did not challenge any particular pleading, position or act by plaintiff but merely threatened Rule 11 sanctions unless the complaint were dismissed with prejudice by September 8, 1998.

14. On August 25, 1999, defendant Bowron filed his motion for Rule 11 sanctions (docket # 113). Again, the filing of the motion came after Judge McKeague's oral ruling dismissing Bowron from the case, but before the dispositive judgment was entered. It does appear that defendant Bowron complied with the requirements of Rule 11(c)(1)(A) by serving the motion before filing it with the court. According to the court's docket sheet, responses by attorney Davis (docket # 111) and plaintiff (docket # 112) were filed with the court before the motion itself was filed.

Discussion

I. Rule 11 Sanctions

In separate motions, defendants Choma and Bowron seek to impose Rule ii sanctions against plaintiff. his former counsel Mr. Davis, and his present counsel Mr. Schmidt. Defendant Choma seeks an award of $1,426.00 plus interest against plaintiff and attorney Davis for expenses incurred as a result of the disciplinary proceedings against Mr. Davis. Ms. Choma seeks an additional award of $3.574.00 plus interest to reimburse her for the cost of defending a frivolous lawsuit. Defendant Bowron seeks to recover $5,000 in attorney's fees for defense of the allegedly meritless claims against him.

A. Rule 11 Standards

The Court of Appeals reviews the grant or denial of a motion for Rule 11 sanctions under an abuse-of-discretion standard. *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 507 (6th Cir. 1998); *Union Planters Bank v. L & J Dev. Co.*, 115 F.3d 378, 384 (6th Cir. 1997). The rule "permits a district court to impose sanctions against an attorney or a party who has filed and signed a pleading, motion or other paper if the court concludes that it was filed for any improper purpose and it has no basis in law or in fact." *Hartleip v. McNeilab, Inc.*, 83 F.3d 767,778 (6th Cir. 1996). "The test for imposition of Rule 11 sanctions is whether the litigant's conduct was

reasonable under the circumstances." 152 F.3d at 507. "'The two goals of Rule 11 are deterrence and compensation. Of these two, deterrence is the principal goal. There is agreement among the circuits, with which we concur, that because deterrence, not compensation, is the principal goal of Rule ii, courts should impose the least severe sanction that is likely to deter." *Jackson v. Law Firm of 0'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989).

In *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997), the Sixth Circuit examined significant changes brought about by the 1993 amendments to Rule 11. The 1983 version of Rule 11 required imposition of sanctions when an attorney failed to satisfy an objective standard of reasonable pre-filing inquiry into the facts or law underlying a claim. The 1983 version "was criticized for spawning satellite litigation, abusing the rule's potential as a fee-shifting device, exacerbating incivility among lawyers, chilling creative advocacy, and disproportionately impacting plaintiffs over defendants, particularly in the civil rights arena." 109 F.3d at 293. "In a significant turnabout, the amended rule now makes the imposition of sanctions for violations discretionary, rather than mandatory. *See* FED. R. Civ. P. 11(c). In line with Rule 11's ultimate goal of deterrence, rather than compensation, the amended rule also de-emphasizes monetary sanctions and discourages direct payouts to the opposing party. FED. R Civ. P. 11 Advisory Committee Notes (1993 Amendments)." 109 F.3d at 293-94.

The *Ridder* decision went on to describe the two-step process a party seeking Rule 11 sanctions must follow. "The 1993 amendments prescribe specific procedural requirements for the imposition of Rule 11 sanctions, a conspicuous change from the former version. 'A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate [Rule 11(b)].' FED. R. Civ. P. 11(c)(1)(A). In accord with the amended rule, a party seeking sanctions must follow a two-step process: first serve the Rule 11 motion on the opposing party for a designated period (at least twenty-one days); and then file a motion with the court." 109 F.3d at 294. "Thus the 1993 amendments allow for a twenty-one day period of 'safe harbor,' whereby the offending party can avoid sanctions altogether by withdrawing or correcting the challenged document or position after receiving notice of the allegedly violative conduct." *Id.* "By virtue of the fact that under the 1993 amendments, a Rule 11 motion cannot be made unless there is some paper, claim or contention that can be withdrawn, it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed. A party must now serve a Rule 11 motion on the allegedly offending party at least twenty-one days prior to the conclusion of the case or judicial rejection of the offending contention. If the court disposes of the offending contention before the twenty-one day 'safe harbor' period expires, a motion cannot be filed with or presented to the

court." 109 F3d at 295; *see Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 384 (6th Cit. 1997)("a party cannot delay serving its Rule 11 motion until the conclusion of the case"), *cert. denied*, 523 U.S. 1094 (1998).

Finally, the 1993 Amendments limited the court's ability to sanction a represented party for pressing legally insufficient claims. Rule 11(c)(2)(A) states, "monetary sanctions may not be awarded against a represented party for violation of subdivision (b)(2)." *See Union Planters Bank*, 115 F.3d at 384; *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 25 (2d Cir. 1995); *see also Glaser v. WJSIII Inc.*, No. 97-55476, 1998 WL 133475, at * 1 n.2 (9th Cir. Mar. 4, 1998) ("Monetary sanctions may not be awarded against a represented party for a violation of Rule 11(b)(2)."). Subdivision (b)(2) provides that, "By presenting to the court. . . a pleading, written motion, or other paper, an attorney.. . is certifying to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

B. Application of Standards

As the decision of the Sixth Circuit in *Ridder* makes clear, a Rule 11 motion cannot call into question past acts or omission of the party opponent. Rather, the rule focuses

scrutiny upon the "safe harbor" period and authorizes imposition of sanctions for the opponent's actions, or failures to act, after service of the draft Rule 11 motion. This bedrock principle imposes important limitations upon the imposition of Rule 11 sanctions in the present case.

First, it is clear that Rule 11 sanctions may not be imposed upon Mr. Davis, plaintiff's former counsel. Mr. Davis was removed as plaintiffs counsel by Judge McKeague's order entered December 4, 1998, months before service of the Rule 11 motions. Obviously, by that time, Mr. Davis was in no position to withdraw any allegedly offending claim. As will be discussed in section II below, Mr. Davis's acts and omissions could certainly be deemed sanctionable under Rule 11. Nevertheless, the 1993 amendments required that Mr. Davis be given a formal opportunity to withdraw any offending claim as a prerequisite to the imposition of Rule 11 liability against him. Furthermore, it should be clear that the so-called "Rule 11 letter" sent to Mr. Davis in August of 1998 was insufficient to satisfy the safe-harbor requirements of Rule 11 with regard to Mr. Davis. Rule 11 expressly requires that the motion itself, and not a letter, be served at least 21 days before the motion is filed. FED. R. Civ. P. 11 (c)(1)(A). Although it is conceivable that a letter could contain sufficient detail to comply substantially with the rule, the letter in this case did not. The letter contained absolutely no identification of any deficiency in the legal or factual support for plaintiffs case. It was merely a "notice" that

defendant Choma will seek Rule 11 sanctions unless plaintiff agreed to dismiss her from the case. The "Rule 11 letter" therefore did not meet either the letter or he spirit of Rule 11(c)(1)(A). As a draft Rule 11 motion was never served by either defendant upon Mr. Davis, he is not subject to Rule 11 sanctions in this action.

Second, plaintiff himself may not be monetarily sanctioned for the maintenance of a claim that was not warranted by existing law. As noted above, monetary sanction for bringing or maintaining a claim or defense unwarranted by existing law may not be awarded against a represented party. FED. R. Civ. P. 11(c)(2)(A). In their motions for sanctions, the moving defendants do not recognize this distinction, instead seeking an award of attorney's fees against both plaintiff and his counsel for the alleged maintenance of frivolous or unmeritorious claims. Such a road-brush approach is not sanctioned by Rule 11.

Third, under the clear holding of *Ridder*, Rule 11 sanctions cannot be imposed unless the moving party has first complied with the "safe harbor" provision by serving a draft copy of the motion and allowing 21 days for the opposing party to withdraw or modify the offending pleading. Defendant Choma concedes that she did not comply with the safe harbor provision, but argues that this requirement of the rule is a technicality that can be dispensed with by the court. Defendant Choma's presentation completely ignores the *Ridder* decision, in

which the Sixth Circuit rejected such a facile treatment of the rule's requirements.

The fourth procedural issue is related to the third. Both Choma and Bowron waited until after Judge McKeague had announced his intention to grant their motions for Luminary judgment before they sought Rule 11 sanctions. For this reason, both motions came too late. As the *Ridder* court explained, "a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn." *Ridder*, 109 F.3d at 295 (*quoting Georgene M Vairo, The New Rule 11: Past Is Prologue?*, 28 LOY. L. A. L. REV. 39,65 (1994)). At the time the defendants filed their motions, plaintiff no longer had a claim against them that could be withdrawn, as Judge McKeague had announced in unequivocal terms his ruling on summary judgment motions. Defendant Choma insists that the court speaks only through its judgments and orders, and that the claims against her were therefore still pending when she filed her motion for sanctions. Although this is true, it fails to distinguish this case from *Ridder*. The *Ridder* court made clear that a party must serve the Rule 11 motion at least 21 days "prior to conclusion of the case or judicial rejection of the offending contention." 109 F.3d at 295. Judge McKeague rejected plaintiffs claims against the moving defendants on May 20, 1999. They did not seek sanctions until long thereafter. Allowing a party to file a motion for sanctions after the court has issued its opinion but before the formal filing of a dispositive order defeats

the purpose of the safe-harbor provision and the ruling in Ridder. After Judge McKeague announced his opinion, plaintiff could no longer withdraw his claims. For the same reason, the court must reject defendant's argument that her failure to comply with the safe-harbor provision could be cured by the mere refiling of her motion. By the time that offer was made, plaintiff could not have withdrawn his claim. Furthermore, withdrawal of the claim would have availed defendants nothing and would not have saved the parties or the court any effort or expense.

For the foregoing reasons, I conclude that the failure of the moving parties to comply with the procedural requirements of Rule 11 precludes an imposition of sanctions against plaintiff or his counsel.

II. Counsel's Liability Under 28 U.S.C. § 1927

Despite the unavailability of Rule 11 sanctions, counsel in any case remains subject to the imposition of costs or attorney's fees under 28 U.S.C. § 1927. That statute provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any TerritoRy thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The record in this case cries out for sanctions against Mr. Davis, whose conduct unjustly caused the many defendants to incur thousands of dollars of needless expense.

A motion for excess costs and attorney's fees under section 1927 is not predicated upon a "safe harbor" period, nor is the motion untimely if made alter the entry of a dispositive order in the case. *Ridder*, 109 F.3d at 297; *In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987). Sanctions may be ordered under section 1927 *sua sponte*, so long as defense counsel has notice and an opportunity to be heard. *See Forman v. Mt. Sinai Med. Center*, 128 F.R.D. 591, 604 n.24 (S.D.N.Y. 1989).[1] Imposition of sanctions under section 1927 is discretionary with the trial court. *Ruben*, 825 F.3d at 984; *see Stephens v. Freeman-McCown*, No. 99-3048, 1999 WL 993870, at * 4 (6th Cir. Oct 19, 1999). Under Sixth Circuit authority, sanctions under section 1927 should not be imposed for simple inadvertence or negligence. "There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls

---

[1] Although both Choma and Bowron sought sanctions against Mr. Davis, they did not invoke section 1927. Consequently, imposition of such sanctions would be in the nature of a *sua sponte act*. This report and recommendation gives Mr. Davis notice of the possibility of such sanctions, and he has the ten-day period provided by law in which to object FED. R. CIV. P. 72(b).

short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Ruben*, 825 F.2d at 984; *accord Ridder*, 109 F.3d at 298; *Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir. 1996).

Under the Sixth Circuit standard, Mr. Davis is subject to the imposition of costs and Fees under section 1927 on two separate grounds. First is the series of events surrounding Mr. Davis's failure to comply with the orders of the court and his subsequent signing of status reports without permission. As Judge McKeague has already found, Mr. Davis consistently showed disrespect for the court, failed to comply with its orders, and violated the rules of professional conduct. (Memorandum Opinion and Order, docket # 88, at 2). Defendant Choma seeks compensation in the amount of $1,426.00 plus interest for the attorney's fees and costs expended by her counsel in preparing for and attending the hearing in Grand Rapids ordered by Judge McKeague to determine whether Mr. Davis committed acts of misconduct. Certainly, the findings of Judge McKeague more than satisfy the Sixth Circuit standard as enunciated in *Ruben* and other cases. That Ms. Choma was forced to expend nearly $1,500 of her own funds as a result of this misconduct is an injustice. Mr. Davis should be sanctioned under section 1927 in the amount of $1,426.00, plus interest from October 1, 1998.

The second class of conduct sanctionable under section 1927 in this case is the filing and maintenance of

vague and unsupportable claims against the two moving defendants. Mr. Davis filed the second and third amended complaints in this action, both of which suffer from an obvious pleading deficiency. Each complaint consists of a long recitation of facts, followed by the assertion of six counts against all defendants, regardless of their factual involvement with the underlying conduct. Mr. Davis's pleadings must be read to be appreciated. It is impossible to determine which of the numerous defendants is alleged to be responsible for any of the counts. This "blunderbuss" style of pleading caused Judge McKeague to require Mr. Schmidt to file a more specific statement sorting out the various claims and parties. (docket # 106). As Judge McKeague noted in his final memorandum opinion:

> Like a blunderbuss, plaintiff's complaint "aims in the general direction of the federal Constitution with buckshot," and fires off allegations of a vast conspiracy undertaken by the various defendants, including plaintiffs ex-wives, one of their attorneys, and several local and state law enforcement officials.

(Memorandum Opinion, docket # 118, at 1-2) (quoting *Coogan v. City of Wixom*, 820 F.2d 170, 174 (6th Cir. 1987). After intense questioning by Judge McKeague, it became apparent that only the claims in count 2 had any relationship to Choma and Bowron. Even at that, Mr. Schmidt was forced to concede that the state claims were barred by the statute of limitations. This should have been

obvious to Mr. Davis on the day the complaint was filed. Consequently, of the numerous federal and state causes of action asserted against these defendants in plaintiffs six counts, ultimately only the section 1983 claim in count 2 had even facial merit. Judge McKeague determined that even this claim was unsupported by any evidence. Although Mr. Davis argues that the section 1983 claim was supportable, he fails to explain why these defendants were subjected to the assertion of numerous claims that were either barred by the statute of limitations or had no conceivable connection with these defendants.

Section 1927 is not a fee-shifting statute. Rather, it authorizes the imposition only of excess costs caused directly by vexatious conduct. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980). Where, however, the vexatious behavior consisted in bringing and maintaining claims without an adequate factual basis, an award of full attorney's fees and costs is justified. This principle is demonstrated by the Sixth Circuit's decision in *Ridder*, in which the Court found that the conduct giving rise to section 1927 liability was the bringing of suit against a city and its police officers "without any evidence to support a basis for municipal liability." 109 F.3d at 298. The court noted that counsel persisted in pressing the allegations over a period of years, "despite unearthing no evidentiary support for the claims even after full discovery." *Id.* In these circumstances, the court found the imposition of full attorney's fees warranted:

> Since we agree with the magistrate judge that Mr. Brannon's unreasonable and vexatious behavior began with the filing of the complaint and persisted throughout the pendency of the case, the magistrate judge did not abuse his discretion by awarding the full amount of attorney's fees incurred by counsel separately retained by Springfield to defend the case against the individual officers.

109 F.3d at 299.

Sanctions under section 1927 are appropriate where an attorney intentionally pursues a claim that lacks plausible legal or factual merit. *Ridder*, 109 F.3d at 298. All claims in counts 1, 3,4, 5 and 6 and all state-law claims in count 2 clearly fit this description with regard to the moving defendants. Defendants Choma and Bowron had no conceivable connection with counts 1,3,4,5 and 6, yet those counts were pleaded in a way that implicated all named defendants. The state-law claims in count 2 were clearly barred by the statute of limitations at the time they were pleaded, as Mr. Davis's successor counsel was forced to concede. This leaves only the section 1983 claims against Choma and Bowron in count 2. In count 2, plaintiff sought to hold his ex-wife (defendant Choma) and her civil attorney (defendant Bowron) responsible for false arrest and malicious prosecution arising from the institution of parental kidnaping charges against plaintiff.

From the outset of this case, several fatal flaws in the section 1983 claim should have been patent to plaintiff's

counsel. Foremost should have been the question whether these defendants, both private citizens, acted under color of state law as required by the very language of section 1983. The essence of plaintiffs section 1983 claim was that his former wife and her attorney provided knowingly false information to Detective Galloup, who then relied upon this information to seek a warrant from the county prosecutor. These facts are completely insufficient to create the nexus necessary for a finding that individuals acted under color of state law. A private party who provides information to the prosecuting authorities or testifies in a criminal case generally does not act under color of state law. *See Briscoe v. LaHue*, 460 U.S. 325, 329-30(1983). A private individual in these circumstances may be said to have acted under color of state law only if he has conspired with state officials, that is, that he "somehow reached an understanding" with state officials, or was a "willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *accord Briscoe*, 460 U.S. at 330 n.7. Absent evidence that such a conspiracy or joint activity took place, however, no section 1983 liability can attach to a private individual, because the statutory requirement that the defendant act "under color of law" is not satisfied. *Adickes*, 398 U.S. at 152.

In the present case, plaintiff pleaded but never proved that the moving defendants acted in a conspiracy with Detective Galloup. At the summary judgment hearing,

the only evidence that plaintiff was able to rely upon consisted of police reports and an affidavit prepared by attorney Bowron for use in a civil custody case. The best that plaintiffs counsel could say is that the information provided by Choma and Bowron was false and that Detective Galloup should have known of its falsity. It is uniformly recognized, however, that a private party does not conspire or act jointly with a state actor simply by complaining to the police. *See, e.g., Collins v. Womancare*, 878 F.2d 1145, 1155 (9th Cir. 1989); *Hughes v. Meyer*, 880 F.2d 967, 972 (7th Cir. 1989); *Carey v. Continental Airlines, Inc.*, 823 F.2d 1402, 1404(10th Cir. 1987); *Sims v. Jefferson Downs Racing Ass'n, Inc.*, 778 F.2d 1068, 1078-79 (5th Cir. 1985). Even providing false information to an arresting officer is not, by itself, sufficient to state a claim against a private party under section 1983. *D'Agostino v. New York State Liquor Auth.*, 913 F. Supp. 757, 770 (W.D.N.Y. 1996), aff'd, No. 96-7229, 1996 WL 547187 (2d Cir. See. 26, 1996); *accord Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985). Rather, there must be some evidence of a concerted effort or plan between the private party and the state official. *Moore*, 757 F.2d at 1352-53. "Private parties are not acting under color of state law merely by acting as complainants or witnesses in state criminal actions." *Spencer v. Slone*, No. 85-5792, 1986 WL 16350, at * 2 (6th Cir. Jan. 10, 1986). "The mere fact that the individual defendants were complainants and witnesses in an action which itself was

prosecuted under color of law does not make their complaining or testifying other than what it was, *i.e.*, the action of private persons not acting under color of law." *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975).

Consequently, although the federal courts have left open a theoretical possibility that complaining witnesses may indeed act under color of state law, the exception is exceedingly narrow, and liability is rarely found. For example, in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Supreme Court reversed the dismissal of a section 1983 claim against private parties because of proof that the parties were part of a "corrupt conspiracy involving bribery of the judge." 449 U.S. at 28. In the present case, plaintiffs had no proof of any such corrupt conspiracy. At best, they were able to point to police reports containing information from the moving defendants that was arguably incorrect or incomplete. No case allows the imposition of section 1983 liability against private parties on such facts.[2]

Consequently, I conclude that none of the claims against the moving defendants should have ever been asserted. These defendants were named in a six-count

---

[2]In addition to the question whether defendants were acting under color of state law, the claims against the moving defendants were subject to all of the defenses that Judge McKeague eventually accepted when ruling upon the dispositive motion of Detective Galloup on the same claims. (*See* Opinion, docket # 118).

complaint, when only one count had any possible connection to them. When that count was scrutinized by the court, the state-law claims were determined to be barred by the statute of limitations, and the section 1983 claim was clearly unsupportable. As in *Ridder*, counsel for plaintiff asserted claims and persisted in pressing them, despite the lack of any evidentiary support. Following the *Ridder* decision, I therefore recommend that the moving defendants be awarded their defense costs in responding to patently meritless allegations. With regard to defendant Choma, fees and costs in the amount of $3,574.00 are sought, over and above the $1,426.00 expended because of Mr. Davis's breach of the Rules of Professional Conduct. Defendant Bowron seeks only to recover his $5,000.00 deductible under his policy of insurance. Both of these amounts are reasonable, and even modest, awards for the expense of defending a federal court lawsuit.

Recommended Disposition

For the foregoing reasons, I recommend that the motion of defendant Choma (docket # 108) and the motion of defendant Bowron (docket # 113) for Rule 11 sanctions be denied on procedural grounds. I further recommend that sanctions in the amount of S 5,000.00 each be awarded in favor of defendant Choma and defendant Bowron against attorney Hugh M. Davis, Jr. pursuant 1028 U.S.C. § 1927.

Dated: January 25, 2000

/s/_____
Joseph G. Scoville
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by WD MICH LCiv R 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir.), *cert. denied*, 522 U.S. 1030 (1997); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).